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In the Supreme Court of the United States

OCTOBER TERM, 1980

J. GREGORY MERRION, ET AL., PETITIONERS

v.

JICARILLA APACHE TRIBE, ET AL.

AMOCO PRODUCTION COMPANY AND MARATHON OIL COMPANY, PETITIONERS

v.

JICARILLA APACHE TRIBE, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE SECRETARY OF THE INTERIOR

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We submit this supplemental brief in light of the Court's action in setting the case for reargument. There is, in our view, no occasion to recapitulate or revise our previous submission and we respectfully refer the Court to the brief we filed at the last Term. No intervening decision, nor any action of Congress, has cast doubt on the arguments then presented. On the contrary, two recent opinions of the Court seem to

reject at least some of the challenges previously interposed to the tribal tax under review.[1]

Yet, we must assume that there remain areas of concern. In attempting to isolate these questions here, we are guided by what the Court has written since the original briefs were submitted and by comments from the Bench during the first oral argument. Of course, these conjectures may miss the mark and we are far from suggesting that the points we now discuss are substantial. We confine our focus there simply because the other issues appear to have been definitively resolved.

1. ***The establishment of the Jicarilla Reservation by Executive Order as affecting the Tribe's power to tax.***

This Court has held that lands set aside for Indian use by Executive action alone could, at one time, be restored to the public domain without any obligation to pay compensation. *Sioux Tribe* v. *United States*, 316 U.S. 317 (1942). See, also, *Ute Indians* v. *United States*, 330 U.S. 169 (1947). Whether that remains true today is unclear. Since 1927, the President has been forbidden to disestablish or diminish Indian Reservations created by him, 25 U.S.C. 398d, and it is at least arguable that by this and subsequent legislation Congress effectively "confirmed" existing Executive Order Reservations so as to confer compensable title in the beneficiary Tribes. See Note, *Tribal*

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[1] We refer to *Montana* v. *United States*, No. 79-1128 (Mar. 24, 1981), which seems to confirm tribal authority to tax non-Indians doing business within a Reservation in circumstances like those presented here (slip op. 19-20); and *Commonwealth Edison Co.* v. *Montana*, No. 80-581 (July 2, 1981), which appears to foreclose most of the arguments advanced by petitioners here under the Commerce Clause or the Supremacy Clause.

Property Interests in Executive Order Reservations: A Compensable Indian Right, 69 Yale L.J. 627 (1960). But, however this may be, the application of the Just Compensation Clause has no bearing whatever on the question presented here.

Indeed, it has never been doubted that Indian Tribes enjoyed the same residual sovereignty within the territory assigned to their use, regardless whether its boundaries were defined by treaty, by Act of Congress, or by Executive Order. Except in respect of the obligation to pay just compensation upon a taking, this Court has never distinguished between Indian Reservations depending on the mode of their creation. On the contrary, when such an argument was last presented here, it was given "short shrift." *Arizona* v. *California*, 373 U.S. 546, 598 (1963). And, most recently, this Court indiscriminately upheld tribal taxes imposed on sales to non-Indians within Indian Reservations, two established by treaty and another by Executive Order, without any suggestion from any quarter that the result should depend on the character of the instrument defining its boundaries. *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-154 (1980).

The rule could not be otherwise. As the Court has stressed, the governmental powers of Indian Tribes, for the most part, are not derived from a federal delegation, but represent the residuum of aboriginal sovereignty. *United States* v. *Wheeler*, 435 U.S. 313, 322-329 (1978). Obviously, prerogatives which do not owe their existence to any provision of treaty, or Act of Congress, or Executive Order, cannot be more or less because the tribal territory was set aside by one means rather than another. Nor can it be suggested that the President—assuming he had authority to do so—diminished tribal powers when he created Indian Reservations. Typically, as here, the Order merely

recites that designated lands are "withdrawn" from the public domain and "set apart as a reservation for the use and occupation" of the named Tribe. See 80-15 Pet. Br. App. 22a, 23a.

To be sure, Congress might have singled out Tribes whose Reservations were established by Executive Order and uniquely reduced their residual sovereignty. Not surprisingly, there is no such discriminatory legislation. For a time, it is true, it was unclear whether there was any authority for granting oil and gas leases affecting tribal lands within Indian Reservations created by Executive Order or even some established by Act of Congress. See 25 U.S.C. 397, 398; discussed in our original brief, at 21-24, and in our memorandum in opposition, at 5, n.1. But that omission was repaired in 1927, by enactment of a statute which effectively eliminated any disadvantage suffered by Indians whose Reservation had been established by Executive action—including the risk that their lands might be taken from them without Congressional intervention. 25 U.S.C. 398a-398d. In every piece of general legislation affecting Indians, including the Non-Intercourse Act, 25 U.S.C. 177, the Indian Trader Statutes, 25 U.S.C. 261-264, the General Allotment Act, 25 U.S.C. 331 *et seq.*, the Indian Reorganization Act, 25 U.S.C. 461 *et seq.*, Public Law 280, as originally enacted in 1953 and amended in 1968, 25 U.S.C. 1321-1326, the Indian Civil Rights Act, 25 U.S.C. 1301-1303, the Indian Financing Act of 1974, 25 U.S.C. 1451 *et seq.*, and the Indian Self-Determination Act of 1975, 25 U.S.C. 450 *et seq.*, no distinction is made between Tribes according to the method by which their Reservations were defined.

In sum, Congress has not created or perpetuated a category of "second-class" Indian Tribes who hold their lands by Executive deed. The opposite is true:

as early as 1918 the Legislative Branch ended the practice of so establishing Indian Reservations for Arizona and New Mexico, 25 U.S.C. 211, imposed a nationwide ban in 1919, 43 U.S.C. 150, and has assured the permanent status of such Reservations since 1927. It is far too late in the day to develop special rules for Executive Order Reservations. Nor is there any conceivable justification for so doing. It is largely an accident of history that some Tribes were confirmed in their diminished territory by formal treaty, others by agreement ratified by statute, still others by unilateral Congressional action, some by Executive implementation of more or less specific statutory directive, and, finally, a number by the Executive acting *sua sponte*. These fortuitous differences of long ago—which Congress has sought to erase and which this Court has consistently treated as irrelevant—ought not now be revived. Except as, exceptionally, special stipulations of law require it, all Indian Tribes should be conceded like governmental prerogatives within their recognized territory. Any other principle is both unworkable and unjust.

2. ***The failure of Indian Tribes to exercise, and of Congress to recognize, taxing power over non-Indians as evidence of the absence or loss of such authority.***

It may be suggested that the Jicarilla Apache lost the sovereign prerogative of taxing activities directly affecting them within their Reservation simply because they slept on their rights too long. Alternatively, the Tribe's failure to assert any such prerogative until very recently, combined with Congressional silence and Executive inaction for some years, may be taken as evidence that the claimed power never existed or did not survive dependent status. Either view must be rejected as bad law and bad history.

a. In this Court, it should be enough to advert to the consequences of such a doctrine as applied to other historically disadvantaged groups, whether blacks or women or aliens. It is hardly necessary to document the tragically long period during which the post Civil War Amendments and the legislation implementing them remained unenforced. Yet, the Court, when its jurisdiction was invoked, was not content to condemn the applicants to the status quo, even if apathy or hostility had established a seemingly permanent regime. *E.g., Brown* v. *Board of Education*, 347 U.S. 483 (1954). Nor is it only constitutional rights that are secure against erosion or loss by non-use. Even if we confine the focus to non-constitutional cases, a modest sampler of decisions "resurecting" apparently moribund civil rights statutes of the Reconstruction era sufficiently illustrates the point: *United States* v. *Mosley*, 238 U.S. 383 (1915); *Buchanan* v. *Warley*, 245 U.S. 60 (1917); *Screws* v. *United States*, 325 U.S. 91 (1945); *Hurd* v. *Hodge*, 334 U.S. 24 (1948); *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410 (1948); *District of Columbia* v. *Thompson Co.*, 346 U.S. 100 (1953); *United States* v. *Price*, 383 U.S. 787 (1966); *Georgia* v. *Rachel*, 384 U.S. 780 (1966); *Jones* v. *Mayer Co.*, 392 U.S. 409 (1968); *Adickes* v. *Kress & Co.*, 398 U.S. 144 (1970); *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971).

There is no reason to adopt a different rule for Indian rights.[2] Indeed, the historical pattern is much

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[2] Although, in our submission, the survival of Indian taxing power would not be in jeopardy even if rested on an unrepealed statute, the tribal prerogative has a firmer footing. To be sure, it is well established that the residual powers of Indian Tribes neither derive from the Constitution nor are pro-

the same. In this Court, it would be presumptuous to rehearse that history in detail. But we may perhaps be justified in stressing that the red man, like the black man, and over much the same period, suffered a long eclipse that spanned the last decades of the Nineteenth Century and most of the first three of the

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tected by it against the will of Congress. And, as this Court has recently observed, "[i]t can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the Tribes." *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, *supra*, 447 U.S. at 157. It does not follow, however, as the same decision made clear, that the Clause is "entirely out of play in the field of state regulation of Indian affairs." *Id.* at 148. Indeed, in *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980), the Court expressly held that, in some circumstances, Indian sovereignty can form an "independent barrier," without benefit of pre-emptive federal legislation, to assertions of State authority over Indian Tribes or activities on their Reservations. *Id.* at 142. Whatever the limits of that principle, no one doubts that, absent delegation of federal authority, States may not abridge "fundamental attribute[s] of sovereignty" (447 U.S. at 152) which Indian Tribes retain, not because Congress has confirmed them, but simply because it has not extinguished them. Since State authority within its boundaries is circumscribed only by federal law or the Constitution itself, it seems inescapable that surviving Indian prerogatives (like the taxing power) which are not mentioned in any statute are, as against all but the United States itself, "constitutional rights" in the same sense as that term is customarily applied to other privileges secured against abridgment by one government or another. Presumably, Congress can lift the bar and permit States to curtail tribal powers—just as it can authorize State action that would otherwise violate the Interstate Commerce Clause. But, in the meanwhile, it is not inaccurate to label "constitutional" the limited immunity that Indian Tribes enjoy from State attempts to reduce their residual sovereignty.

Twentieth. Formal recognition of Indian Tribes as quasi-sovereign nations with whom treaties were appropriately negotiated ended in 1871 and, henceforth, the House of Representatives was free to respond to public pressures by using the power of the purse to diminish tribal sovereignty and reduce tribal land holdings. See *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 380-384, 417-420 (1980). For a time, many of the Tribes were effectively confined within assigned Reservations under close supervision and rendered wholly dependent on federal aid. Very soon, however, the political branches of the Government determined upon a policy of "integrating" the Indian and ending tribal existence, placing him under State jurisdiction. By 1887—ironically the date of the first Jim Crow law—that direction had been enthusiastically embraced in the General Allotment Act, whose ultimate objective was to end the "separateness" of Indian Tribes. See *Montana* v. *United States*, No. 79-1128 (Mar. 24, 1981), slip op. 13-14 n.9. Whatever the admixture of benevolence and self-interest informing it, that policy, persisting for almost half a century, did not "assimilate" the Indian, but it largely succeeded in destroying the autonomy of tribal governments—which, if they survived at all, became corrupt or, at best, tame agents of the federal bureaucracy. See, *e.g.*, *Stephens* v. *Cherokee Nation*, 174 U.S. 445, 453 (1899); *Brown* v. *Lane*, 232 U.S. 598 (1914); *Seminole Nation* v. *United States*, 316 U.S. 286, 295-308 (1942). It was not until 1928, at the earliest, that the Executive and Legislative Branches began to have second thoughts, and only in 1934 was an effective turn-about mandated by law.

b. In these circumstances, it is hardly surprising if most Indian Tribes were not, until recently, actively

exercising their remaining sovereign prerogatives. Least of all, when survival of tribal identity itself was at stake, could one expect a full assertion of governmental power over non-members who were exploiting Reservation resources. To be sure, some of the large and relatively independent Civilized Tribes of Oklahoma exercised their power to tax non-Indian activities within their Reservations as late as the turn of the Century, and they were vindicated in the courts, including this Court. See *Morris* v. *Hitchcock*, 194 U.S. 384 (1904). But, very soon, their governments were all but abolished, tribal lands were allotted, and State jurisdiction was imposed. Understandably, for some time, that example was not imitated. Gradually, most of the Tribes lost the habit of self-government and any pretension to self-sufficiency was abandoned. Typically, the Indians were grateful passively to accept often less than provident arrangements, negotiated on their behalf by federal officials, for the exploitation of what lands they retained, whether for grazing or agriculture or the cutting of timber or the extraction of minerals. Tribal enterprises were rare indeed, and tribal regulation or taxation of outside lessees was far too bold an idea to enjoy currency.

That was the prevailing climate in 1927, all the more so within Executive Order Reservations where, until that year, the Tribe's title to the reserved lands remained subject to defeasance by Executive fiat and its right to enjoy the mineral resources of the Reservation was disputed. No doubt, the Jicarillas were then far from ready to assert any taxing prerogative. And we may assume that no one else, in Congress or the Executive Branch, was adverting to that prospect. Hence, the total silence on the subject during the legislative proceedings leading

to the 1927 Act. Indeed, it was not until 1968 that the Tribe asserted a right to tax non-members engaged in business on the Reservation and only in 1976 that the power was first exercised.

c. The pattern we have sketched explains why the Jicarilla Apache, like most Indian Tribes, have only recently asserted their full governmental powers. But it does not remotely suggest the absence or loss of those prerogatives. One might equally argue that the black man lost his claim to be free of discrimination because for so long he acquiesced in its denial. Or, by a parity of reasoning, it could have been objected to the first State severance tax that it was beyond the police power because, for more than half a century before, no State had claimed such a prerogative. As it happens, moreover, tribal taxation of non-members doing business within Indian Reservations was not a novelty. As this Court recently stressed, for some time Indian Tribes asserted and exercised such taxing power with the full approval of all branches of the National Government. *Washington v. Confederated Tribes of the Colville Indian Reservation, supra,* 447 U.S. at 152-153. See, also, our original brief herein at 9-12. Unless Congress effectively changed the rules, it cannot matter that during a dark age the prerogative went unexercised.

It is not suggested that any legislation before 1927 touched tribal powers of taxation. But petitioners assert that, in that year, Congress effectively extinguished any such prerogative, if only by acting in a way that reveals no awareness of the tribal prerogative now asserted. That would be novel doctrine, indeed. Not infrequently, Congress acts without a full or accurate awareness of the legal status quo, or the potential future. But, except when there is a plain conflict, the preexisting law remains in effect, however "dormant" it may have been. It may be doubted,

for instance, whether the Congress that enacted the Mineral Leasing Act of 1920, when it preserved any existing State power to tax mineral production, contemplated that Montana would be free to collect a coal severance tax that netted greater revenues than its royalty share from federal coal. Yet, that misapprehension (as we suppose) cannot affect Montana's prerogative. *Commonwealth Edison Co.* v. *Montana*, No. 80-581 (July 2, 1981). So, also, it is probable that Members did not, in 1927, anticipate that Indian Tribes on Executive Order Reservations would, decades later, achieve a measure of self-sufficiency by taxing cigarette sales within their borders, by vindicating long unexercised commercial hunting and fishing rights or licensing them to outsiders, or by developing tourist attractions. See *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, *supra*; *Washington* v. *Fishing Vessel Ass'n*, 443 U.S. 658, 668-669 & n.14 (1979); *Montana* v. *United States*, *supra*, slip op. 11; *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973). But, plainly, those privileges cannot suffer merely because Congress did not focus on their continued existence or their ultimate implementation.

d. Although there is no basis whatever for so assuming, the result would be no different if one could conclude that Congress would have revoked tribal taxing power had it thought about it. The fact is that no such decision was made—nor could have been made by legislators who were not conscious of the prerogative in question. That is the end of the matter. Only in the clearest case may one find an implied repeal of legislation. *E.g.*, *Watt* v. *Alaska*, No. 79-1890 (Apr. 21, 1981). Even stronger evidence should be required when it is not claimed that Congress took back what it had earlier given, but, rather, abrogated

residual sovereign powers existing wholly apart from any congressional grant, and did so, moreover, not by deliberate design, but by accident.

As we have elaborated in our original brief (at 18-32), there is no arguable inconsistency in conferring taxing authority on the State while leaving undisputed any comparable tribal prerogative. Nor does the legislative history of the 1927 Act invoked by petitioners suggest any exceptional departure from the usual rule. Petitioners have suggested that the Tribe's power to tax the lessee's interest was divested because, after extended consideration, Congress granted the States the power to tax that interest. But the truth is that allowing State taxation of the *lessee's* interest was never a contested issue. Every proposal included that feature, and no one suggested that this pre-empted tribal taxation. The only question that arose during congressional consideration of the legislation was how to give States something more: a share of royalties—with or without strings attached—or, as was ultimately decided, the power to tax the tribal royalty interest. See our original brief, at 24-32. The division of the Tribe's royalties obviously has no effect on the taxation of the lessee's quite separate interest. The upshot is that the Congress of 1927 did not, consciously or unconsciously, extinguish the pre-existing authority of the Jicarilla Tribe to tax the severance of their Reservation minerals. Indeed, having never considered the matter, the legislators of the time can hardly be understood to have expressed any opinion on that question. What remains of tribal autonomy is not so mysteriously manipulated out of existence, as Congress itself has more recently recognized. See 15 U.S.C. (Supp. III) 3320(c)(1).

3. *The "ex post facto" character of the tribal tax as an obstacle to applying it to existing lessees.*

Of course, the Jicarilla mineral severance tax is not remotely an *ex post facto* law in the constitutional sense: it operates only prospectively. We borrow the pejorative term only to deal with the argument of petitioners, lessees whose contracts were executed some years ago, that they would be treated unfairly if (as is the case) they, as well as any future mineral lessees, are subjected to this new burden. The suggestion, superficially appealing, is that the Tribe is impermissibly attempting to increase its share of lease benefits by labelling the incremental exaction a "tax," rather than an added royalty, barred by contract stipulations. We confront the question without attempting to rephrase it.

a. The answer does not turn on the "motive" of the Tribe: obviously, it seeks to maximize, for the benefit of all its members, the revenues derived from a depleting tribal resource. So do most responsible governments. The dispositive point is whether the Jicarilla Tribe is entitled to exercise, and is here exercising, a sovereign prerogative of taxation—as the United States or a State or a municipality might do with the same ultimate objective. If the Tribe enjoys such governmental power, it need no more explain or apologize to its contractors than do the States of New Mexico or Montana or Louisiana, or any other States, that have increased their severance tax rates as against all existing lessees, including those who hold leases on State-owned lands.[3] Only in extraor-

[3] Quite properly, petitioners conceded in the court of appeals (J.A. 161) that a fixed royalty "provision does not preclude a sovereign that is also a lessor from imposing a tax which has the practical effect of increasing its revenues." In-

dinary circumstances does a government absolutely commit itself not to impose, or increase, taxes against an invitee. Assuming such arrangements are ever binding, this plainly is not such a case. There was here no express waiver of the taxing prerogative. Nor can any such stipulation be read into the contract, even if one assumes that the lessees would have succeeded in insisting on a "no tax" clause had they thought of it. *Rapid Transit Corp.* v. *New York*, 303 U.S. 573, 590-596 (1938). Absent a "clear and unmistakable" provision, the sovereign prerogative will not be deemed surrendered. *Id.* at 590-591. See, also, *El Paso* v. *Simmons*, 379 U.S. 497 (1965).

b. Thus, we return to the central question: Does the Jicarilla taxing ordinance represent an exercise of *governmental* power, or is it no more than an attempt by a lessor unilaterally to vary the terms of a contract? The answer is not in doubt. Indeed, a year ago, eight Members of the Court expressly joined in the holding that Indian Tribes generally—including those whose Reservations were established by Executive Order—retain a "power to tax transactions occurring on trust lands and significantly involving [the] [T]ribe or its members" as "a fundamental attribute of sovereignty," since that prerogative was "not implicitly divested by virtue of the tribes' dependent status" nor by any "federal statute" indicating "any congressional departure from this view." *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, *supra*, 447 U.S. at 152, 153; *id.*

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deed, at least two of the petitioners with leases on State-owned land testified that New Mexico had recently increased its severance taxes, and that petitioners had no objection that this constituted a unilateral increase in royalties (IV R. 67, 82-83). Amicus State of Washington agrees (Br. 2-3) that the States may take such action.

at 165 (Brennan and Marshall, J.J., concurring and dissenting), 174-175 (Stewart, J., concurring and dissenting).[4] And, even more recently, the Court, without dissent on this score, reiterated that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands," including, specifically, authority to "regulate, through taxation * * *, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana* v. *United States*, *supra*, slip op. 19.

There is simply no way to read those obviously well considered and deliberate statements of the Court as conceding to Indian Tribes no more than a landowner's right to condition entry onto his property upon payment of a fee. That would hardly be the exercise of "a fundamental attribute of sovereignty" or "inherent sovereign power." Besides, in both *Colville* and *Montana*, the Court approved the ruling in *Buster* v. *Wright*, 135 F. 947 (8th Cir. 1905), which sustained tribal occupational taxes as applied to commercial activities on town sites within the Reservation which the Tribe no longer owned and from which they had been specifically prohibited from evicting the white settlers. See *id.* at 951-952, 953-954, 958. And, in the *Montana* case, slip op. 19, the Court explicitly included "non-Indian fee lands" within a Reservation as subject to tribal civil jurisdiction, although the Tribe obviously could not exclude the owners from such parcels.

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[4] The concurring and dissenting opinion of Justice Rehnquist, *id.* at 176-190, does not mention tribal taxation, but does not dissent from the Court's holding on this question.

c. Petitioners are misled when they insist that, traditionally, tribal taxes have been no more than "optional" preconditions. Of course, all local taxation is, in one sense, a "condition" of entry, or residence, or engaging in business, within the borders of the municipality, county, or State. With respect to non-citizens, that is the usual, if not the only, justification for *any* governmental tax. It is accordingly not surprising to find such a formulation in some of the cases sustaining tribal taxes. *E.g.*, *Morris* v. *Hitchcock*, *supra*, 194 U.S. at 389. When the Tribe is both landowner and territorial sovereign, the nature of a "permit tax" may be obscured. But there can be no doubt that tribal taxes have been approved when they necessarily drew on *governmental* power.

Thus, the Chickasaw tax involved in *Morris* v. *Hitchcock* was sustained over the objection of cattle owners that the Tribe was exacting a fee in addition to the grazing rent agreed between the cattlemen and individual members of the Tribe, who, as effective owners of their lands, had been authorized to enter into such arrangements by the Curtis Act (Act of June 28, 1898, ch. 517, Sections 16 and 23, 30 Stat. 501 and 504). See 194 U.S. 384; 21 App. D.C. 565, 569, 578, 595-598 (1903). So, also, as already noted, the tax challenged in *Buster* v. *Wright* reached the activities of merchants on town sites they had actually bought and paid for and who were also subject to like municipal taxes authorized by Congress. See Section 14 of the Curtis Act, 30 Stat. 499-500, and Section 17 of the Act of Mar. 1, 1901, ch. 676, 31 Stat. 861, 867. And, finally, we should notice this Court's apparent approval, in *Morris*, of the Attorney General's ruling sustaining a Cherokee hay export tax which would be valid as applied to a shipper within the

Reservation even if he were "the absolute owner of the land on which the hay was raised." 194 U.S. at 392.

Nor has this principle lacked more recent reaffirmation. Besides the decision below, the principle of Indian taxation applying to non-members within a Reservation as "an inherent incident of * * * sovereignty" was confirmed in *Iron Crow* v. *Oglala Sioux Tribe of Pine Ridge Reservation*, 231 F.2d 89 (8th Cir. 1956), cited with approval by this Court in the *Colville* case. 447 U.S. at 153. And, of course, the *Colville* decision itself sustains tribal taxes that cannot remotely be explained as conditions precedent to entry into the Reservation, to residence there, or to setting up business on Indian lands. Among other things, the taxes applied equally to non-members of the Tribe who were permanent residents of the Reservation and could not be excluded. In sum, the Court has confirmed the continuing vitality of the proposition that Indian Tribes retain a power of taxation that is akin to that of municipal governments, that is not dependent on continuing ownership of the lands or minerals involved, and that is not frozen as of the date when outsiders obtained their privileges within the Reservation.

d. We need not press the argument further. This case does not require the Court to decide whether a Tribe may assess real property taxes against "fee lands" within Reservation boundaries, or to what extent their use may be regulated. We assert only that, unless the Tribe has been expressly divested of the power by Act of Congress or has clearly surrendered it in a given case, every Indian Tribe may tax the exploitation of tribally-owned mineral resources within its own territory. If that is so, the lessees must be deemed to have entered onto the Reservation subject

to the exercise of that prerogative and cannot complain because they assumed it would not be asserted. That is simply a risk common to all those who choose to enter another jurisdiction to do business. See *Morris* v. *Hitchcock*, *supra*, 194 U.S. at 392, 393. Petitioners do not complain that New Mexico has increased its severance tax; they have no more ground to challenge the modest Jicarilla tax. On the contrary, they can count themselves fortunate that the Tribe was so slow in asserting its undoubted prerogative, and so reasonable when it determined that the interest of future generations required some provident action before its wealth was wholly depleted.

4. ***The Jicarilla severance tax as discriminating against interstate or off-Reservation commerce.***

We turn, finally, to the claim that the Jicarilla tax is discriminatory, a point of special focus at the original argument of the case. While adhering to what has been said about the inapplicability of usual Commerce Clause analysis in the present context (see our original brief, at 35-43), we now confront the discrimination charge directly.

a. In light of the Court's intervening decision in *Commonwealth Edison Co.* v. *Montana*, *supra*, we need not rebut the allegation that the tribal tax discriminates against *interstate* commerce. If it was not settled before, it is no longer arguable that local taxation offends the Commerce Clause merely because the product, or most of it, is ultimately consumed out of state. Nor is there the slightest basis for suspecting that the Jicarillas have "tailored" their tax so that the burden will fall beyond the borders of New Mexico. That is a matter of complete indifference to the Tribe. Whatever else is ambiguous, it is entirely clear that the Jicarilla ordinance imposes the iden-

tical tax on oil and gas severed from its Reservation regardless whether it is consumed in New Mexico or in other States.

b. It is suggested, however, that the ordinance discriminates between products that leave the Reservation and those that do not. Even if this were true, we do not know what applicable rule of law would be violated. To invoke the Indian Commerce Clause against *tribal* action would be novel indeed. See our original brief, at 36-38, 41-42. But the short answer to the argument is that the premise is wrong.

In sustaining the Jicarilla ordinance, the court of appeals explicitly rejected the construction asserted by petitioners (J.A. 155):

> The clear thrust of the ordinance is that the taxable event is severance or bringing the resources to the surface. To be sure, the ordinance's phrase "severed, saved and removed from Tribal lands" is ambiguous, for the taxable event could be removal from the territorial boundaries of the reservation after severance. But we think the phrase "remove from Tribal lands" merely means removal from the soil, as the Tribe argues. This interpretation is reinforced by the explicit requirement that the taxes are due at the time of severance. Nor does the provision that the tax rate is to be applied to oil or gas "sold or transported off the Reservation," alter this conclusion. Although this phrase is also ambiguous, it would seem to mean the tax rate is applied to natural gas and oil that is sold on the reservation or transported off the reservation before sale. The only products not included in the tax computation are those used by the operators in the process of production and those received by the Tribe as royalty in kind. All other products are taxed at the time of severance.

One may speculate that the district court viewed the matter differently. But it did not say so. That court, in its Findings of Fact (No. 31, J.A. 130) and Conclusions of Law (No. 6, J.A. 132), merely reproduced the ambiguous language of the ordinance, without construing it. The Tribe, which enacted the ordinance, and the United States, which approved it, have explained its scope in a manner wholly consistent with the text,[5] and it has been sustained on that basis. That is now the authoritative construction, binding on all. In these circumstances, there is no occasion for this Court to re-interpret the operative words.

c. To be sure, as the court of appeals noted, there are two exemptions from the tax: (1) oil and gas neither sold nor exported, but "used by the operators in the process of production" (J.A. 155); and (2) "[r]oyalty gas, oil or condensate taken by the Tribe in kind, and used by the Tribe" (Ordinance § 4, J.A. 39). The first provision is commonplace in oil and gas severance tax schemes and is, in any event, not objected to. The exemption for tribal royalty oil and gas taken in kind and used by the Tribe, on the other hand, is said to work discrimination. The argument is contrived and, in any event, without substance.

We earlier answered the complaint on this score by explaining that "the Tribe, being both the owner and the taxing authority, is simply avoiding the wasteful exercise of moving revenues from one pocket to the other" (Brief, at 43). Then, as now, we assumed that, although the ordinance imposes the

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[5] As has been said, the reason for specifying minerals "transported off the reservation," in addition to those "sold," as subject to the tax, was to reach gas extracted by producers who also owned pipelines and consummated no sales on the Reservation, while exempting oil and gas that was never sold. See IV R. 209-210.

liability on the operator at the moment of severance (§§ 1 and 5, J.A. 38-39), he was free to pass on the burden to the recipient. It was not immediately apparent how the operators could complain of an exemption from tax liability on some part of their production.[6] But petitioners have imagined a scenario under which the Tribe takes its royalty in kind and then sells it, tax-free, to their prejudice. Those fears are unfounded. The exemption, in terms, applies only to royalty oil or gas "used by the Tribe"—not to products resold to others. In short, the ordinance does not permit any preferential tax-free scheme whereby the Jicarilla Tribe could undercut its lessees in the commercial market.

In sum, under actual conditions, the Jicarilla ordinance works no discrimination whatever. All production—except only what is re-used in the extraction process—is taxed at the same rate, whether it is sold before or after it leaves the Reservation, and regardless whether it is ultimately used in New Mexico or in some other State. Nor, assuming the issue is ripe, is there any prospect of discriminatory treatment in future arrangements that we can conceive. No exemption, for instance, is given for Indian producers. And the Tribe cannot profit from its exemption by selling its share of production at tax-free rates to competitors of its lessees. We conclude that the charge of discrimination levelled against the Jicarilla ordinance is baseless.

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[6] We note that New Mexico's oil severance law exempts the producer from paying the tax on the value of royalties due the United States, Indian Tribes, and the State itself, whether taken in money or in kind. N.M. Stat. Ann. § 7-29-4.1 (1980 Supp.).

CONCLUSION

For the reasons stated here and in our original brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 1981

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* The Solicitor General is disqualified in this case.

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